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No. 98-678

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

Los Angeles Police Department,

Petitioner,

v.

United Reporting Publishing Corp.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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BRIEF OF THE INDIVIDUAL REFERENCE SERVICES GROUP AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether government, consistent with the First and Fourteenth Amendments, may on grounds of privacy discriminate in revealing public record information based upon the requester's expressive use of the information, even though the government allows the same information to be published in any newspaper, and to be obtained by any licensed private investigator or political operative, scholar or government official.

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INTEREST OF *AMICI*

The position urged by the Petitioner in this case—that government may, in the name of protecting privacy, discriminate against and selectively restrict expression using information contained in arrest records on the basis of its content or commercial purpose—could extend to the dissemination of information contained in virtually all public records. *Amici*,[1] whose members include LEXIS-NEXIS and West Group, offer public record information services. They use public record information, not for purposes of solicitation, but instead to communicate the information to their subscribers. The sort of regime at issue in this case has a serious, discriminatory effect on public record information services, placing them at a decided disadvantage vis-à-vis others, including competitors such as the media and private investigators, who are favored under the statutory scheme.

The Individual Reference Services Group ("IRSG") represents 13 leading information industry companies that provide commercial information services to help identify, verify information about, or locate individuals. See http://www.irsg.org. In providing their services, IRSG members draw upon public record information. Address information from public records is an important tool for preventing the misidentification of individuals. This is particularly true of records about events such as arrests.

Public record information services often provide faster access to that information in formats demanded in the market, combine it with information from various other sources for quick reference, assure its reliability and integrity, and offer customer support and other assistance in

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. Neither party wrote any part of this brief or contributed to its financial support.

using the information. These services bring more information by and about government to more members of the public every day, so that a central goal of effective democracy—an informed citizenry—can be achieved.

These services play an important role in facilitating law enforcement, fraud prevention and detection, and a range of business transactions and legal proceedings. A wide variety of businesses and institutions rely on access to public records through these services. For example, members of the legal community have long used databases of public record information to locate heirs and assets, enforce judgments, conduct "due diligence" in connection with company mergers, and serve parties and witnesses.

Although the vast majority of IRSG member companies do not compile or use arrest information, a few obtain such information from certain states for use for employment screening of, for example, school bus drivers, child care workers, and nursing home orderlies. The Fair Credit Reporting Act and related state laws govern the use of arrest information for such purposes, by, *inter alia*, requiring a subject's written consent to the release of the information and requiring the reporting company to help ensure that such information is complete and up to date. See, e.g., 15 U.S.C. §§ 1681b(b)(2)(B), 1681k(2).

The Software & Information Industry Association ("SIIA") represents 1,400 members throughout the United States and around the world. See http://www.siia.net. SIIA member companies develop products and services for education, home, corporate and Internet markets, encompassing the entire spectrum of the software code and information content markets.

Many SIIA member companies acquire information from government sources and incorporate it into their products and services. SIIA is a leading voice in debate about private sector distribution of government-held information. SIIA opposes governmental efforts to deny access, discriminate in

providing access, or impose restrictions upon the public's use of government-held information collected and maintained at taxpayer expense. SIIA strongly supported enactment of the information dissemination provisions of the Paperwork Reduction Act of 1995, which clearly state the federal government's policy of widely disseminating public information in a nondiscriminatory manner and without restrictions on its use. See *infra* n.10.

The IRSG and SIIA are interested in this case because Petitioner and its *amici* ask the Court to alter fundamental principles of open records law upon which their member companies have long relied in developing their businesses, investing hundreds of millions of dollars to provide customers with access to this information. The outcome of this case may affect the continued availability of public record information services for a variety of socially beneficial purposes discussed in Section III *infra*.

STATEMENT OF THE CASE

The California statute at issue in this case, section 6254 of the California Government Code, directs that all information about an arrestee contained in an arrest record other than his or her address must be disclosed, CAL. GOV'T CODE § 6254(f)(1) (Deering 1999), allowing any casual observer to obtain the arrestees' names, physical description and details of their alleged crimes. It authorizes state, local, and federal officials to obtain an arrestee's address without regard to whether they subsequently publicly disclose it. See § 6254(f)(3).

Moreover, the statute contains several major exceptions under which members of the public may obtain and widely disseminate address information from arrest records. As the Ninth Circuit noted, the media are at liberty to place address information together with the arrestee's name and alleged crime on the front page of any newspaper or magazine, or simply to republish it along with a long list of other arrest

records. See United Reporting Publ'g Corp. v. Lungren, 146 F.3d 1133, 1140 (9th Cir. 1998). The statute specifically authorizes a further use incompatible with the privacy of this information, permitting any licensed private investigator to obtain the information for any investigative purpose. Finally, it provides yet another exception for scholars and political operatives to obtain and disseminate this information in publications, press statements and databases as long as they do not use it to sell any other product or service. See § 6254(f)(3).

Under this regime, even address information from arrest records is by no means private. Indeed, instead of protecting the privacy of these arrestees, the statutory regime selectively but fundamentally undermines it, while substantially increasing the risk that citizens with common names will be misidentified as having been arrested.

SUMMARY OF THE ARGUMENT

As all the federal courts of appeals have correctly concluded, the sort of regime imposed section 6254(f)(3) is a restriction on expression that is subject to heightened First Amendment scrutiny. The statute on its face restricts expression using public record information, and both the statute's legislative history and concessions of the Petitioner and its *amici* confirm that this was the principal purpose for adopting the restriction. The government's characterization of section 6254(f)(3) as a denial of access statute rings hollow. As numerous courts below have concluded, government cannot escape heightened First Amendment scrutiny through the simple formalism of re-framing its discriminatory suppression of speech using public record information as an access restriction.

The position asserted by the government in this case would give government broad powers that are antithetical to the First Amendment. First, government would be empowered substantially to reduce both commercial and

non-commercial speech directed to individuals who have been the subject of government action. Second, government would receive a monopoly over important information about the workings of government, reducing competition from other speakers. Finally, by giving the government control over subsequent uses of public record information by requesters and other users, the position would effectively overturn the long-standing American rule that government does not have a copyright in public record information.

Section 6254(f)(3) cannot be redeemed as a permissible subsidy decision because the record provides no support for this analogy. On the contrary, it reveals that California and its localities may, and often do, charge for copies of their arrest records.

Even if this Court were to consider section 6254(f)(3) an access restriction rather than a use restriction, the statute still would be unconstitutional. There is a constitutional right of access to arrest records, as *amicus* Investigative Reporters and Editors, Inc. clearly demonstrates. Moreover, with regard to public record information generally, Petitioner and its *amici* in fact propose a major and quite dangerous expansion of the decisions of this Court regarding access to non-public government information upon which they rely. These cases all concerned requests for special, enhanced rights of access (exceptions to a rule of general applicability), rather than a law targeting particular uses for disfavored treatment by denying access. Thus, this Court may rule for Respondent without disturbing either Houchins v. KQED on the one hand or Rust v. Sullivan on the other.

Section 6254(f)(3) is so riddled with exceptions and inconsistencies reflecting the state's decidedly equivocal policy toward protecting the privacy of arrest information that it cannot survive First Amendment scrutiny as a content-based restriction either on commercial or non-commercial speech. Section 6254(f)(3) fails as a content-based restriction because it allows dissemination of arrestee

addresses only for favored forms of non-commercial speech, but not for others. Its restriction not only prevents solicitation, but also prohibits communication of the underlying information unless for a statutory purpose. The statute is plainly not narrowly tailored to serve its goal. Nor does it materially and directly advance privacy, the interest that the government invokes to defend the statute. Indeed, disclosures to the media, licensed private investigators, political operatives, and government officials, intrude upon an arrestee's privacy as much as, or more, than disclosures to others. The statute's discrimination against other speakers conveying virtually identical information distorts the marketplace, and offends the First Amendment.

The major statutory exemptions and inconsistencies, coupled with the availability of other regulatory options that would have advanced the stated interest in a manner less intrusive of First Amendment rights, leave no basis for upholding section 6254(f)(3) as a content-based restriction on either commercial or non-commercial speech.

Finally, this Court should be careful not to sacrifice the important benefits provided by public record information services by accepting Petitioner's suggestion that expression using public record information obtained from the government is not subject to First Amendment protection. Public record information services play a role very similar to that of traditional media in disseminating public record information, and enjoy the same First Amendment protections. Moreover, these services provide significant societal benefits. For all these reasons, this Court should reject any broad rule eliminating constitutional protection for expression using public records.

ARGUMENT

I. SECTION 6254(f)(3) MUST BE SUBJECTED TO HEIGHTENED FIRST AMENDMENT SCRUTINY.

A. Denying Access to Public Records Based on the Requester's Intended Expressive Use Is a Use, Not an Access, Restriction.

Restrictions that discriminate in access to public record information based on the content of the expression for which recipients will use that information require heightened scrutiny under the First and Fourteenth Amendments.

On its face, section 6254(f)(3) operates as a two-tiered use restriction. First, it allows use of address information only by individuals who have one of a defined set of "purposes" for using the information. Second, it requires these individuals to sign a statement under penalty of perjury pledging that the information in the records will not be used directly or indirectly by these individuals or others to whom they may transfer the information "to sell a product or service to any individual." Id.

This type of restriction on use of public record information denies members of the *amici* IRSG and SIIA an essential element of public record information that is linked reliably to the names of individuals in public records only at the government source. Such restrictions operate against them even though the approved users of the information—including the media and private investigators—may use the information for purposes identical or similar to those of *amici's* members by providing it to the public for a fee.[2]

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[2] In fact, the media and private investigators are significant customers of *amici's* members. With regard to these customers, statutes such as section 6254(f)(3) have the unusual effect of allowing these end users to obtain the public record information directly from the government, but prohibiting public record information services from supplying the very same information to them.

1. The Federal Courts of Appeals Have All Agreed that Such Statutes Are Use Restrictions Subject to Heightened First Amendment Scrutiny

Section 6254(f)(3) is an unconstitutional restriction on the use for expressive purposes of information derived from public records. Every federal court of appeals that has reviewed similar arrest record statutes has treated them as use restrictions on commercial speech. The Fifth, Sixth, Tenth, and Eleventh Circuits all agreed with the Ninth Circuit on this,[3] and in the court below Petitioner itself agreed that this test should apply. Indeed, even the circuit conflict relied upon in the petition for *certiorari* concerned the proper application of the commercial speech doctrine, not Petitioner's assertion that heightened scrutiny does not apply at all.[4] Although the restriction at issue is in fact a content-based restriction on both commercial and non-commercial expression, see Section II *infra*, these authorities demonstrate that heightened scrutiny must apply to section 6254(f)(3).

Petitioner and its *amici* labor to protect section 6254(f)(3)'s tortured restriction on expression containing information derived from public records by characterizing it as a simple restriction on *access* to those records. However, the statute is obviously aimed at restricting *use* of, not access to, the information in question. This is apparent from the plain language of the statute, from its legislative history, and from admissions in petitioner's and its *amici's* briefs.

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[3] See Innovative Database Systems v. Morales, 990 F.2d 217 (5th Cir. 1993); Amelkin v. McClure, 168 F.3d 893 (6th Cir. 1999); United Reporting, 146 F.3d 1133 (9th Cir. 1998); Lanphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994), *cert. denied*, 513 U.S. 1044 (1994); Statewide Detective Agency v. Miller, 115 F.3d 904 (11th Cir. 1997); Speer v. Miller, 15 F.3d 1007 (11th Cir. 1994). Moreover, not a single judge on any of these panels disagreed with this conclusion.

[4] Petition for Certiorari at 7-8. See United Reporting, 146 F.3d at 1136; Lanphere & Urbaniak, 21 F.3d at 1513.

As noted above, on its face, section 6254(f)(3) operates as a two-tiered use restriction. The committee reports for California Senate Bill 1059 confirm that the drafters of section 6254(f) sought to stop use of arrestee address information for purposes of solicitation. See, e.g., Joint Appendix at 11. Furthermore, Petitioner and *amici* Attorneys General concede that the statute is a use restriction. See Pet. Br. at 13 (the statute "simply limits the use of the information"); Br. of States of New York *et al.* at 22 (section 6254(f)(3) "targets . . . use of address information in bulk for solicitation of arrestees").

Thus, a principal purpose of section 6254 is undeniably to suppress speech—in the form of commercial and non-commercial solicitation. See United Reporting, 146 F.3d at 1139 (instead of protecting the privacy of arrestees, the statute "appears to be more directed at preventing solicitation practices").[5] Indeed, the statute is an attempt to achieve by other means what the Kentucky Bar was unable to achieve in Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). Petitioner and its *amici* readily acknowledge this purpose in their briefs. See Pet. Br. at 36-37; Br. of the States of New York *et al.* at 14-24. The government cannot escape heightened First Amendment scrutiny simply by re-framing its suppression of speech using public record information as an access restriction. See, e.g., United Reporting Publ'g Corp. v. Lungren, 946 F. Supp. 822, 825 (S.D. Cal. 1996) (concluding upon review of the record that "[t]he government cannot denominate this a limitation on access in order to achieve a limitation on non-preferred speech").

Federal courts of appeals confronted with very similar statutes have had no difficulty concluding that they were use, not access, restrictions. For example, the Colorado statute at issue in Lanphere & Urbaniak contained a very similar

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[5] The other justification, administrative burden, has been waived by petitioners. See United Reporting, 146 F.3d at 1138 n.3.

requirement of a signed statement affirming that the records "shall not be used for the direct solicitation of business for pecuniary gain." 21 F.3d at 1511. Colorado argued, as do the Petitioner and its *amici*, that because the statute functioned by denying users access to records based upon the requester's intended use, it should not be subject to heightened First Amendment scrutiny. The Tenth Circuit rejected this argument, concluding instead that "the Colorado Legislature has drawn a regulatory line based on *speech use* of [arrest] records," id. at 1513, and that the law must survive scrutiny under the Central Hudson[6] test. Accord Amelkin v. McClure, 168 F.3d at 897 (rejecting Kentucky's argument that a similar restriction was "a pure denial of access statute" and applying heightened scrutiny).

FEC v. International Funding Inst., 969 F.2d 1110 (D.C. Cir. 1992) (en banc), relied upon by the Solicitor General, Br. of the United States at 19-20, 22-23, is not to the contrary. First, that case assumed that intermediate scrutiny applies to restrictions on solicitation using the particular records in question. Id. at 1114, 1116. More importantly, the result in International Funding Inst. hinged upon the fact that access to FEC contributor lists for solicitation purposes would have distorted the marketplace by allowing companies to exploit without charge the work of competitors who filed reports containing their fundraising lists. See id. at 1119-20 (Buckley, J., concurring). By contrast, as discussed more fully below, section 6254(f)(3) itself distorts the marketplace by bestowing unique benefits on certain competitors that undermine, rather than advance, the stated government interest. As Judge Randolph's concurring opinion suggests, a statute that instead "place[s] restrictions on the use of information the government itself has generated and released

[6] Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

to the public," presents a very different case. Id. at 1121 (Randolph, J., concurring).

2. Indirect Content-Based Restrictions Are Not Subject to Minimal First Amendment Scrutiny

Petitioner's and the Solicitor General's contentions that standard First Amendment doctrines do not apply because section 6254(f)(3) operates as an indirect restriction on expression must likewise be rejected. This Court has repeatedly struck down restrictions on First Amendment freedoms even where they operate indirectly.[7]

Nor have these cases been limited to restrictions on non-commercial speech. For example, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), invalidated a selective prohibition on placing newsracks for commercial publications on city property. The restriction operated indirectly: it was limited to expression disseminated using city property, and did not restrict dissemination through means other than newsracks or in other venues. Similarly, this Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), invalidated another indirect restriction on speech—a prohibition against use of the U.S. mails for solicitations of contraceptives. See id. at 80 (Rehnquist, J., concurring) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights.").

Cutting off use of essential source material for a non-commercial or commercial communication is every bit as significant a barrier to expression as the indirect restrictions

[7] See, e.g., Waters v. Churchill, 511 U.S. 661, 674 (1994); Minneapolis Star & Tribune v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983); Buckley v. Valeo, 424 U.S. 1, 58 (1976); Miami Herald v. Tornillo, 418 U.S. 241, 256 (1974); cf. Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("If the purpose or effect of a law is to . . . discriminate . . ., the law is constitutionally invalid even though the burden may be characterized as being only indirect.").

at issue in these other cases, and should receive *at least* the same level of constitutional scrutiny.

Nor, in the specific context of use of information contained in public records, have the courts of appeals been reluctant to strike down such indirect restrictions on expression. For example, the Second Circuit in Legi-Tech v. Keiper, 766 F.2d 728 (1985), held that providing preferential access to legislative materials to a governmental legislative information service violated the First Amendment rights of a competing service. Id. at 733. Similarly, the Tenth Circuit in Lanphere & Urbaniak expressly rejected the notion that a similar public record use restriction was sheltered from heightened First Amendment scrutiny because it "only indirectly burden[ed] speech." 21 F.3d at 1515 n.5.

Petitioner's theory that an indirect restriction on speech "borders on the ethereal," Pet. Br. at 14, and is no restriction at all, is abhorrent to the First Amendment. It would give the government virtually unlimited power to control expression regarding government operations that use public records.

The United States' theory that such restrictions are invalid only if viewpoint-based, Br. of United States at 22-24, also must be rejected. A restriction on use of public record information has far more than "an incidental effect" on expression. See id. at 22. The government is the only source for this information and has a monopoly on address information linked to the name of the arrestee, which is critical both to confirming the identity of an arrestee with a common name and to communicating with arrestees for purposes discussed in Section II A. of Respondent's brief.

The United States' theory would give the government broad power to control and manipulate use of information about the workings of government. Such power is repugnant to the First Amendment. Under this theory the government could impose any non-viewpoint-based restriction it wished on use of public record information.

In this case, California has required disclosure to, and favored speech by, certain speakers in the marketplace. It has established an oligopoly of speakers to whom someone interested in verifying the address of an arrestee or communicating with an arrestee for purposes other than solicitation must turn. Those who wish to obtain the information must either purchase one of the newspapers, such as the Sacramento Bee, that publish arrestee names and addresses or must hire a licensed private investigator to obtain it for them. They may not, however, obtain the information themselves or use a public record information service to obtain it. This sort of regime does little or nothing to promote privacy. It simply channels information into one stream by blocking its flow through another, cf. Greater New Orleans Broad. Ass'n v. United States, 119 S. Ct. 1923, 1932-33 (1999) (noting similar channeling effect of selective advertising ban), and enriches the media and licensed private investigators,[8] while delaying access to the information and raising the cost of obtaining it in the many jurisdictions where the press does not publish the information for free.

Furthermore, this rule would allow the government to do what it has attempted in this case—substantially to reduce both commercial and non-commercial speech directed to individuals who have been the subject of government action. It would give the government the power to hold arrestees partially incommunicado, isolated from information that may be of immediate benefit to them, provided that the restriction was not viewpoint-based. Indeed, under the statute at issue, government could likely prevent speakers who had been

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[8] Contrary to the Solicitor General's suggestion, nothing in the statute indicates that the access by private investigators is limited to "a presumably limited number of cases in which address information is germane to a legitimate, specifically focused private investigation." Br. of United States at 27. The information instead is freely available for any "investigation purposes" by a licensed private investigator. § 6254(f)(3).

harmed by government action from communicating with one another for the purpose of organizing a common defense.

If this Court were to endorse this broad power, government would doubtless use it in a variety of instances to establish a monopoly over other important information about the workings of government, "control[ling] or reduc[ing] competition from other speakers." See, e.g., Legi-Tech, 766 F.2d at 733. As the Second Circuit noted in Legi-Tech when confronted with one such scheme, "The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion." Id.

Indeed, the power that Petitioner claims to control subsequent uses of the information by requesters and others would overturn the long-standing American rule that the government does not have a copyright in government information. See, e.g., 17 U.S.C. § 105; Building Officials & Code Adm'rs Int'l v. Code Tech., Inc., 628 F.2d 730, 732-33 (1st Cir. 1980) (explaining history of rejection of copyright in government documents at common law).[9] It would give the government monopoly power akin to the Crown copyright doctrine under English law which deems the King or Queen the owner of the materials produced by government and can control subsequent uses of such information. As one court noted in a somewhat different context, "All monopolies are odious, and English history does not furnish an example of one more odious in principle

[9] Commentators have long argued that Congress may lack the constitutional authority to extend copyright protection to works of government at any level. See, e.g., Henry Perritt, Jr., "Sources of Rights to Access Public Information," 4 Wm. & Mary Bill Rts. J. 179 (1995) (copyright incentives are not needed to induce the government to produce information); 1 Nimmer on Copyright § 5.06[B][4] (1996) (prohibiting the reproduction or distribution of governmental information on the basis of the government's copyright interest in the information would run afoul of the First Amendment).

or vexatious in practice." In re Chambers, 44 F. 786, 791 (D. Neb. 1891) (directing clerk of federal circuit court to make available judgment records to commercial users).[10]

B. California's Attempt Selectively to Deny Access to Address Information from Public Records is Constitutionally Infirm

1. There Is a Constitutional Right of Access to Arrest Records

As *amicus curiae* Investigative Reporters and Editors, Inc. conclusively demonstrates, the act of arresting an individual—an exercise of the most coercive sort of governmental power—is an event that falls squarely within a historical tradition of openness requiring First Amendment protection. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (recognizing a constitutional right of access to jury selection where "[p]ublic jury selection . . . was the common practice in America when the Constitution

[10] The monopoly power at the heart of the Petitioner's theory is anathema to the federal government's long-standing policy of open and unrestricted access to public information. Most recently, in the public dissemination provisions of the Paperwork Reduction Act of 1995 ("PRA"), Congress prohibited federal agencies in most instances from, among other practices, "establish[ing] an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public" or "restrict[ing]. . . the use, resale, or redissemination of public information by the public." 44 U.S.C. § 3506(d)(4)(A)(B). See H.R. Rep. No. 99, 104th Cong., 1st Sess., 34 (1995) (section 3506(d)(4) "prevent[s] agencies from discriminating against or otherwise disadvantaging any class of users, particularly commercial users"). This policy has been clarified from time to time, starting in the early 19th century, see, e.g., Act of August 12, 1848 ch. 166 (requiring federal judicial records to be open for inspection "without any fee or charge").

Given this long-standing federal policy of unrestricted access to public record information, it is ironic that the United States has sided with the Petitioner in arguing that California may control the public's use of public information.

was adopted"); see also Br. of the United States at 33 n.15 (implicitly conceding this). Furthermore, the importance of public monitoring of this tremendous power and the danger of secret arrests solidly grounds access to arrest information as a constitutionally protected right.

The summaries of the common law of open records advanced by the Petitioner and its *amici* do not pertain to arrest records and, therefore, are inapposite. Moreover, these summaries ignore that at common law the right to inspect public records was absolute. The limitations upon that right were judicial in nature and stemmed entirely from use of the writ of mandamus to vindicate the right. See, e.g., Nowack v. Auditor General, 219 N.W. 749 (Mich. 1928) (summarizing the history of the right to inspect public records and use of the writ as the remedy to enforce the right). This writ originally was a prerogative writ that proceeded from the King himself who sat on his court of King's bench. In time, the right to the writ was extended to private individuals, but they could not sue under the writ in their own names unless they could show some special interest to be enforced. See id.

The judicial rule regarding an individual's ability to sue was a restriction on a citizen's remedy, rather than on his or her right of access. See Wellford v. Williams, 110 Tenn. 549, 75 S.W. 948, 958 (Tenn. 1903) ("In theory the right of examination [of public records] is absolute, but in practice it is at last only a matter of discretion because . . . the right must be enforced by mandamus.") Recognizing socio-economic and other differences between England and the United States, the American judiciary modified the writ's anachronistic limitations and expanded the range of situations where courts would enforce the right to inspect public records. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) ("In contrast to the English practice, American decisions generally do not condition enforcement of this right [to inspect and copy public records]

on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.") (citations omitted).[11]

Accepting the government's theory would eviscerate a centuries-long tradition of access to such records, and set a dangerous precedent imperiling transparency of important government functions. See Legi-Tech, 766 F.2d at 733 (First Amendment violated where government denies access to create a monopoly on dissemination of government information);[12] see also Houchins v. KQED, 438 U.S. 1, 36-38 (1978) (Stevens, J., dissenting) (First Amendment prevents government from concealing from the public information about "an integral component of the criminal justice system.")

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[11] For example, differences between the concentration of property in England, where most realty was held in large estates by nobility and passed on intact to heirs, and its dispersion in the United States, where small holdings in fee were frequently sold and transferred, brought recognition of a wider public interest in property records. See, e.g., In re Chambers, 44 F. at 790 ("at common law judgments were not liens on land, and the necessity that now exists for examining the records had no existence then"); Cole v. Rachac, 35 N.W. 7 (Minn. 1887) (enforcing a title abstract office's request to access and copy the county's property registry records to create a commercial repository of records in part because "they are usually the only place where abstracts of title can be conveniently obtained").

[12] Legi-Tech, a database company, was correctly treated as an organ of the press in Judge Winter's opinion. Similarly, both United Reporting and members of the IRSG and SIIA perform the same communicative function in the case at hand. Their role in republishing government information cannot be distinguished from the role of the press in republishing the information. Cf. National Sec. Archive v. United States Dep't of Defense, 880 F.2d 1381, 1387 (1989) (entity that uses editorial discretion in compiling documents from a variety of sources and redisseminating them is a "representative of the news media" for purposes of FOIA). Such line-drawing is impermissible when entities communicate similar information. See Greater New Orleans, 119 S. Ct. at 1935; First National Bank v. Bellotti, 435 U.S. 765, 777 (1978).

2. Petitioner Proposes a Major Expansion of this Court's Precedents Restricting Rights of Access to Government Records

As noted above, Petitioner's position would give the government sweeping new authority to pick and choose which private citizens may review routine public record information and control subsequent uses of that information.

The decisions of this Court regarding access to government records cited by Petitioner are far more limited. None involved information such as arrest records, to which there is a centuries-long tradition of access. Furthermore, all concerned requests for special, enhanced rights of access that were exceptions to a rule of general applicability, rather than legislation targeting particular uses for disfavored treatment by denying access. See, e.g., Nixon, 435 U.S. at 609-10 (press denied access to copies of tapes to which others never had physical access); Houchins, 438 U.S. at 4-5 (three-justice plurality) (press denied access to prison that no one outside prison system was allowed to obtain); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (rejecting argument that the First Amendment provided a special exception to State Department criteria for granting passports for travel to Cuba). Such rights to special exemptions are disfavored under the First Amendment. See Employment Div. v. Smith, 494 U.S. 872, 879-80 (1990).

Petitioner and its *amici* in fact seek a major and quite dangerous expansion of the "no special access" principle established in the access cases upon which they rely. Indeed, Justice Stewart's concurring opinion in Houchins, which was essential to the majority, specifically stated that unequal treatment would raise constitutional concerns. Houchins, 438 U.S. at 16 ("The Constitution does no more than assure the public *and* the press equal access once government has opened its doors.") (emphasis added).

Section 6254(f)(3) raises precisely this problem. It directly and explicitly favors certain speakers and

competitors in the marketplace (for example, private investigators) while excluding competing services such as those of public record information services. Cf. 44 Liquormart v. Rhode Island, 517 U.S. 484, 505-06 (1996) (noting as part of the Court's First Amendment analysis the incidental anti-competitive effects of the prohibition against price advertising). Private investigators and the press receive specific exemptions and unique advantages under the statute. They may include for profit in their statutorily exempt services the very same information that Petitioner attempts to justify as "private" under the statute.

Nor does affirmance require either recognition of a broad right of access to all information within the government's control, or a right governed by "ad hoc standards." Pet. Br. at 24, 26, 30. Unlike in Houchins, Respondent does not seek a broad right of access to sources of information within government control. It simply asks to be treated equally with other speakers according to well-established First Amendment doctrines that did not require the court below to engage in the ad hoc decision-making that troubled the Houchins plurality. 438 U.S. at 14.

To the extent that California has *required* disclosure of almost all elements of arrest records, and *explicitly authorized* disclosure of address information from these records for a wide range of purposes, it should not be allowed in granting access to discriminate against certain forms of non-commercial and commercial expression on privacy grounds. At issue is a provision that discriminates on its face on the basis of the content of speakers' expression, and whose avowed purpose is to reduce both non-commercial and commercial speech. Furthermore, this case hinges on public records, which have a very different practical and historical status than either internal government documents (much less details of prison management at issue in Houchins) or government subsidy decisions.

3. Because California Is Not Subsidizing Speech, this Court's Government Subsidy Precedents Do Not Apply

Petitioner's and its *amici's* attempt to characterize the use restriction as a permissible governmental subsidy decision, sheltered from heightened scrutiny under Rust v. Sullivan, 500 U.S. 173 (1991), is unavailing. Rust, Regan v. Taxation with Representation, 461 U.S. 540 (1983), and their progeny concerned *government funding decisions* or closely related tax subsidy decisions. See, e.g., National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998) ("Government may allocate *competitive funding* according to different criteria").

Here California is in no way subsidizing speech, and the record cannot support this characterization. In fact, the record reflects that California and its localities are free to *charge* for copies of their arrest records—and that they often do so, in some cases at prices above cost. Supplemental Excerpts of Record ("SER") 639-53. Moreover, Petitioner and the State of California presented no evidence to support their contention that these disclosures cost the State or its localities any money. Id. *passim*. Finally, arrest records are public records, almost all of which California *requires* be disclosed to *anyone* upon request. Unlike public expenditures, they are not a finite public resource whose benefits government must selectively bestow.

This Court has refused to extend Rust to contexts where government was not funding recipients to speak on its behalf, much less not funding them at all. See Rosenberger v. Rector & Visitors, 515 U.S. 819, 833 (1995) (distinguishing Rust because government was not "disburs[ing] public funds to private entities to convey a governmental message"); id. at 892 n.11 (Souter, J., dissenting). It certainly should not accept the Solicitor General's suggestion that the doctrine be expanded to authorize the government to discriminate in withholding

public record information that it dispenses at or above cost, favoring certain speakers over others based upon the non-commercial or commercial content of their speech. Thus, the Court may rule for Respondent without disturbing either Houchins on the one hand or Rust on the other.

II. SECTION 6254(f)(3) IS UNCONSTITUTIONAL REGARDLESS OF WHETHER IT IS A RESTRICTION ON COMMERCIAL OR NON-COMMERCIAL SPEECH.

The statute fails to pass muster under ordinary analysis of content-based restrictions on expression and commercial speech analysis because it does not directly and materially advance its stated interest in protecting privacy and is broader than necessary for achieving its goal.

As *amici curiae* The Newsletter Publishers Association and The Washington Legal Foundation demonstrate, the statute is a content-based restriction on expression, allowing dissemination of arrestee addresses for favored uses that do not propose a commercial transaction, but not for others. Indeed, this sort of statutory regime operates in precisely this way with regard to public record information services. It discriminates against their communication of the information to the public based upon the content of their communication. See, e.g., Carey v. Brown, 447 U.S. 455, 465 (1980) (invalidating a statute that allowed labor picketing but prohibited other picketing in residential areas); First National Bank v. Bellotti, 435 U.S. at 777 ("The inherent worth of the speech . . . does not depend upon the identity of its source").

Even if this Court were to conclude that section 6254(f)(3) is a commercial speech restriction, the statute would still clearly fail the Central Hudson test. See 447 U.S. at 566. A core concern of the Central Hudson analysis is that government not restrict commercial speech in a highly selective fashion that distorts the marketplace. See Greater New Orleans, 119 S. Ct. at 1933; Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995); Virginia State Bd. of

Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Section 6254(f)(3) suffers from precisely this defect. To avoid misidentifying arrestees with common names, conscientious end users will be required to use the services of a class of favored disseminators of the information, including journalistic reports, private investigators, and political opposition and campaign contributor research specialists. The statute prevents potential customers from using the services of disfavored potential disseminators such as United Reporting and public record information services.

As with the statutes struck down in Greater New Orleans and Rubin, section 6254(f)(3) is so riddled with exemptions and inconsistencies that it does not sufficiently advance the government's stated purpose of protecting privacy.[13] At the same time, the statute is considerably broader than necessary to serve that interest, as demonstrated by similar, more narrowly tailored California statutes.

First, the statute directs that all information about the arrestee other than his or her address *must* be disclosed. § 6254(f)(1). Thus, any casual observer can obtain the individual's name—which is more sensitive than an address. Second, it authorizes state, local, and federal officials to obtain an arrestee's address without regard to whether they then publicly disclose it. See § 6254(f)(3). Third, the statute creates an exemption under which the media may freely obtain an arrestee's address, and either place it on the front

[13] Petitioner and its *amici* now suggest that section 6254(f)(3) is a measure to protect arrestees from discrimination, or to protect the privacy of crime victims. These issues are not properly before the Court, as Petitioner waived them below and has not met the government's burden of proof with regard to either issue. In any event, the statute is equally infirm with regard to both these interests. It is no less underinclusive, and, in the case of crime victim addresses, more obviously overbroad, as section 6254(f)(2) offers a clear example of a more narrowly tailored approach to withholding information concerning crime victims.

page of any newspaper or tabloid magazine or simply republish it along with a long list of other arrest records. See United Reporting, 146 F.3d at 1140. Fourth, it carves out yet another exception for researchers and political operatives to obtain and place this information in books and databases as long as they do not do so to sell a product or service. See id. Fifth, it allows licensed private investigators to obtain and use the information for *any* investigation. See *supra* note 8.

In fact, as the California First Amendment Coalition warned the legislature during consideration of Senate Bill 1059, by withholding the addresses but revealing the names of arrestees, far from protecting the privacy of arrestees, the statute instead substantially increases the risk that innocent individuals will be misidentified as having been arrested for crimes. SER 382.

A. California's Policy Is So "Decidedly Equivocal" that It Fails to Establish that Privacy Is in Fact a Substantial Interest in this Context

The net result is a statutory regime riddled with inconsistencies. Although in other cases before this Court the government has been able to establish a legitimate and substantial interest in protecting the privacy of its residents, California's "unwillingness to adopt a single . . . policy that consistently endorses [that] interest" undermines its characterization of its interest in this context as being "substantial." See Greater New Orleans, 119 S. Ct. at 1932; see also id. at 1930 (concluding that it "is by no means self-evident" that government has a substantial interest due to conflicts in government policy). Consequently, the state's "decidedly equivocal" policy toward protecting arrestee information causes the statute to fail the second prong of the Central Hudson test. Id. at 1931-32.

For the same reasons, the *amici* Attorneys General are mistaken in their attempt to rely upon this Court's Freedom of Information Act ("FOIA") jurisprudence as supporting the irrationally discriminatory regime embodied in section

6254(f)(3). See Br. of States of New York *et al.* at 10-14. Under FOIA, when privacy interests outweigh the interest in disclosure, the result is the rational one of withholding the information from *all* private parties. Petitioner and the *amici* Attorneys General would twist this jurisprudence to give the government sweeping power merely to invoke privacy in order to withhold government information *selectively* from some private parties, but not from others whose use of the information is no less compatible with privacy.

Moreover, under FOIA, the reasons for the request, see United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989), and the uses that can be made of the information in serving a public or private interest are irrelevant. See Department of State v. Ray, 502 U.S. 164, 179-81 (1991) (Scalia, J., concurring). By contrast, under section 6254(f)(3), the purpose for requesting the information and its eventual use for solicitation of any product or service (not concerns about arrestee privacy) are decisive.

Furthermore, FOIA is far from the only source of federal policy relevant to the California law. As noted above at n.10, the Paperwork Reduction Act of 1995 further undermines the argument that federal law or policy supports California's irrational approach to privacy protection.

B. The Statute Is So Riddled with Exceptions that it Does Not "Materially and Directly" Advance the Stated Interest

The government bears the burden under the third prong of Central Hudson of demonstrating that a speech restriction "directly advances the governmental interest asserted," see, e.g., Greater New Orleans, 119 S. Ct. at 1932; Edenfield v. Fane, 507 U.S. 761, 770 (1993), and must show that a "ban will *significantly*" advance the government's interest, 44 Liquormart, 517 U.S. at 505 (plurality opinion) (emphasis added), and "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Edenfield, 507 U.S. at 770-71. In this case, as in Greater New Orleans and Rubin, the government's stated interest in protecting privacy is undermined directly and fatally by the significant exceptions in the statute so that section 6254(f)(3) cannot "directly and materially advance" this goal.

Like the discriminatory advertising ban of 18 U.S.C. § 1304 invalidated in Greater New Orleans, section 6254(f)(3) clearly reveals the state's "simultaneous encouragement" of disclosures of arrestee addresses to the public that are incompatible with the asserted statutory goal. 119 S. Ct. at 1933. "[T]he Government presents no convincing reason for pegging its speech ban" to the statutory categories, in light of its purported goal. Id. at 1934. Indeed, disclosures to licensed private investigators, the media, political operatives and government officials intrude on an arrestee's privacy as much as or more than disclosure to others, such as public record information services. (They are also as or more likely to produce "discrimination" against arrestees.) Furthermore, private investigators and newspapers that republish arrestee address information deliver the same information that Respondent and public record information services would deliver, with newspapers delivering it to a much larger audience. As Greater New Orleans underscores, government "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." Id. at 1935.

Moreover, the effect of the challenged restriction on speech must be "evaluated in the context of the entire regulatory scheme." Id. at 1934 (citing Rubin, 514 U.S. at 488). Here, "the general thrust of [California's] policy . . . favor[s] greater disclosure of information, rather than less." Rubin, 514 U.S. at 484. Indeed, the statute actually *requires* disclosure of all other elements in arrestee records, including information such as name and alleged crime that is more sensitive than the arrestee's address. Cf. id. (noting that the

statute at issue required disclosure of alcohol content on wine and spirit labels).

California uses non-discriminatory and far more effective means of protecting privacy for other public records. For example, the state provides that victims of spousal abuse may obtain fictitious addresses from the Secretary of State, who serves as their agent for purposes of service of process. CAL. GOV'T CODE §§ 6205-11 (Deering 1999). It requires state and local agencies to use the substitute address on any records made available for public inspection, and prohibits disclosing the person's real address absent a court order or request by law enforcement. Id. at §§ 6206, 6208. Similarly, section 1808 of the California Vehicle Code requires redaction of home addresses from motor vehicle records for legislators and state and county employees involved in the criminal justice system upon their request. CAL. VEH. CODE §§ 1808.4, 1808.6 (Deering 1999).

Both provisions directly and materially advance the stated government interest in privacy by prohibiting disclosure of home address information to the public *without exception*. These other approaches take to heart the Court's observation in Florida Star v. B.J.F., 491 U.S. 524 (1989), that instead of criminalizing speech, government can "classify [sensitive] information [and] establish and enforce procedures ensuring its redacted release." Id. at 534. They contrast strikingly with the "Swiss-cheese" approach to disclosing addresses in section 6254(f)(3) and demonstrate that the state could have protected the privacy of arrestees, but instead chose a very different course.

Likewise, the states that filed an *amicus curiae* brief in support of Petitioner also use a variety of non-discriminatory, more targeted, and far more effective means

of protecting privacy interests in public records than the flawed approach at issue here.[14]

These other statutes confirm the Ninth Circuit's conclusion regarding the overall irrationality of the statutory scheme at issue in this case. The "numerous exceptions" in section 6254(f)(3) risk producing "a far greater affront to privacy" than the uses that it prohibits. United Reporting, 146 F.3d at 1140. Because "other provisions of the same act directly undermine and counteract its effects," section 6254(f)(3) fails to "directly and materially advance its aim." Rubin, 514 U.S. at 489.

C. The Restriction Is "More Extensive than Necessary" in Light of Readily Apparent, More Narrowly Tailored Alternatives.

Section 6254(f)(3) also is "more extensive than necessary" to advance its stated goal. Central Hudson, 447 U.S. at 566. For example, the same statute allows either the victim or the victim's parent or guardian to prevent all disclosure of the name of a crime victim. § 6254(f)(2). Similarly, the California spousal protection and Vehicle Code provisions discussed *supra* p.26 clearly demonstrate that section 6254(f)(3) is not narrowly tailored. Both provisions provide for confidential treatment of address information of only narrow categories of individuals with a particular need for privacy protection. Even for these victims of abuse and public employees, release of address

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[14] For example, Hawaii, Nevada, and Washington have enacted fictitious address programs similar to that of California for victims of domestic violence, see HAW. REV. STAT. ANN. § 576B-312 (Michie 1999), NEV. REV. STAT. § 217.464 (1997), WASH. REV. CODE § 40.24.010 *et seq.* (1999), while Colorado, Delaware, and South Carolina in their victims' bill-of-rights statutes have enacted measures to ensure that government officials do not publicly disclose at least the addresses and telephone numbers of victims, see COLO. REV. STAT. ANN. § 24-4.1-303(2) (West 1999), DEL. CODE ANN. tit. 11, § 9403 (1998), S.C. CODE ANN. § 16-3-1525(C) (Law. Co-op. 1998).

information is suppressed only upon their request. CAL. VEH. CODE §§ 1808.4, 1808.6. These approaches avoid the statute's paternalistic assumption that no individuals in public records want to be found or contacted by others, while protecting the First Amendment rights of those individuals to receive information. See, e.g., Greater New Orleans, 119 S. Ct. at 1935-36 (speaker and the audience, not Government, should be left to assess the value of accurate, non-misleading information about lawful conduct).

The varied statutory exemptions and inconsistencies, coupled with the availability of other regulatory options that could have advanced the asserted privacy interest in a manner less intrusive of First Amendment rights, leave no basis for upholding the statute under this Court's doctrines governing content-based regulation of expression generally or commercial speech specifically.

III. DATABASES OF PUBLIC RECORD INFORMATION PROVIDE IMPORTANT PUBLIC BENEFITS THAT THIS COURT SHOULD BE CAREFUL NOT TO SACRIFICE.

Petitioner and its *amici* all urge this Court to accept theories that would give the government broad authority to adopt a discriminatory, essentially irrational approach to disclosing public records. They cite the possibility of databases of arrestee information as justification for that regime.

The IRSG and SIIA include the leading public record information services, whose customers overwhelmingly consist of government and business professionals, as well as journalists. Almost none of their members disseminate any arrest record information. However, the position urged by Petitioner and its *amici* would have far broader implications and remove First Amendment protection for virtually all public record information services. This Court should reject it.

As the court held in Legi-Tech, electronic database providers, like IRSG and SIIA members LEXIS-NEXIS and West Group, are organs of the press entitled to full First Amendment protection. 766 F.2d at 732. Indeed, in an era in which electronic information is becoming an increasingly important source of news and information for citizens, id.; see also Reno v. ACLU, 521 U.S. 844 (1997), curbing the information available from information services significantly reduces the free flow of ideas and information.

Moreover, commercial dissemination of public records serves a wide array of important functions. These services increase both the transparency of government operations to private citizens, and increase governmental efficiency by providing a reliable source for inter-agency record retrieval. Indeed, federal, state and local governments are a significant part of IRSG and SIIA members' customer base.

These services also allow professionals to obtain information without the cost and inconvenience of retrieving and copying a record from an agency or hiring a private investigator to retrieve the information in county offices. Furthermore, these services are as accurate and, in some instances, more accurate and complete than the original source.

The services are used for a wide range of beneficial purposes, including important government objectives such as locating criminals, fugitives and witnesses to crimes, child support enforcement, finding biological parents, consumer protection, and environmental enforcement. For example, current records are helpful for verifying an individual's identity, locating a non-custodial spouse, finding a spouse's hidden assets, and confirming whether professionals, such as doctors, lawyers and private investigators who are the subject of consumer complaints, in fact have valid licenses. Furthermore, federal and state environmental agencies use land record databases to trace ownership of land in order to

identify polluters and to warn individuals who live or formerly lived in hazardous waste areas.

The services also assist important private sector activities, including press investigations into the workings of government and campaign donations. They have become an increasingly important tool for fraud prevention efforts by businesses extending consumer credit or performing due diligence before engaging in business ventures in the increasingly mobile world economy. The services also are widely used in the legal profession for purposes as diverse as locating witnesses, finding readily admissible evidence, and locating heirs to estates. Moreover, non-profit health services use public record services to locate blood, bone marrow, and organ donors.

For all these reasons, in this case, which has important implications for all types of public records, the Court has further reason to avoid broad rules eliminating constitutional protection for expression using public records. Cf. Denver Area Educ. Telecomm. Consortium Inc. v. FCC, 518 U.S. 727, 741-43 (1996) (declining to adopt a broad new First Amendment rule when confronting a new technology).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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